No. 86-581 (2)

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NEW YORK STATE RESTAURANT ASSOCIATION, INC.; BUS TRAVELERS INN, INC.; AND HERO-BOY, INC., d/b/a Manganaro's Hero-Boy Restaurant,

Appellants,

vs.

THE CITY OF NEW YORK; and DAVID J. SENCER, M.D., M.P.H., Commissioner of Health of the Department of Health,

Appellees,

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

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December 10, 1986

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OCTOBER TERM, 1986

NEW YORK STATE RESTAURANT ASSOCIATION, INC., BUS TRAVELERS INN, INC.; AND HERO-BOY, INC., d/b/a Manganaro's Hero-Boy Restaurant,

Appellants,

vs.

THE CITY OF NEW YORK; and DAVID J. SENCER, M.D., M.P.H., Commissioner of Health of the Department of Health,

Appellees,

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

STATEMENT

The appellees, The City of New York and David J. Sencer, Commissioner of Health of the New York City Department of Health, move to dismiss the appeal herein, or, in the alternative, to affirm the final order of the

Court of Appeals of the State of New York entered July 10, 1986 on the grounds that the appeal does not present a substantial federal question or that the federal question sought to be reviewed was not properly raised and was not expressly passed on.

QUESTIONS PRESENTED

1. Whether Article 7 of the New York City Health Code, which establishes an administrative tribunal in the New York City Department of Health for adjudication of alleged violations of the laws enforced by the Department, is violative of due process?

2. Whether the July 6, 1983 Order of the New York City Commissioner of Health, which announced a new Department of Health enforcement policy and outlined a mechanism for pleading by mail to notices of violation issued by the Department, is unconstitutionally vague?

3. Where plaintiffs raised for the first time on appeal in state court that the Department's inspections of restaurant premises are tantamount to "unreasonable searches" in violation of the Fourth Amendment, and the courts of New York did not pass on the issue, may jurisdiction be sustained under 28 U.S.C. §1257(2)?

FACTS

(1)

The general enabling legislation for the Department of Health is found in Chapter 22 of the New York City Charter. That chapter vests in the Department and its commissioner the authority necessary to regulate all matters affecting health in the City of New York (NYC Charter, §§555, 556). The Charter also provides for a Board of Health within the Department whose chair shall be the Commissioner of the Department of Health (NYC Charter, §553). The Board of Health

is authorized to add to, amend or repeal any part of the Health Code of the City and may: "...confer additional powers on the Department not inconsistent with the constitution, laws of this state or charter, and may provide for the enforcement of the health code or any orders made by the commissioner or the board of health, by such fines, penalties, forfeitures and imprisonment as may be prescribed therein or otherwise by law" (NYC Charter, §558[b]).

The New York City Health Code ("Health Code") had been promulgated pursuant to the authority of section 558 (formerly §1706[2]) of the Charter and establishes, inter alia, the enforcement procedures of the Department. Article 3 of the Health Code is a general statement of the authority of the Department and provides that the Department may inspect any premises (including restaurants) where an

activity regulated by the Health Code is being carried on (Health Code, §3.01). Any person or establishment which is determined to have violated the code is subject to a fine, penalty or forfeiture of any permit issued by the Department (Health Code, §3.12). Prosecution of every violation is not mandated by the code. Pursuant to section 3.13 of the Health Code, the Department may seek voluntary compliance through the issuance of notices and warnings or may proceed by other educational alternatives. However, the availability of such voluntary methods does not restrict the Department in its use of compulsory enforcement methods and there is no requirement that voluntary or non-compulsory methods be employed prior to the commencement of any code enforcement proceeding. As part of its enforcement powers, the Department has classified

various types of code violations for restaurants and other food-service establishments. Those violations which are considered the most serious are classified as "Schedule A"; all other violations are "Non-Schedule A". The Schedule A list was last revised in 1974.

In addition to classification of violations, since 1980 the Department has also employed the Value Reference Scoring System ("VRSS"), a numerical scoring system which establishes a minimum passing score for an inspection. Both the classification system and the scoring system are explained as part of the mandatory food protection course given by the Department to all new food-service establishment licensees.

Prior to 1971, the Department charged Health Code violators with a misdemeanor in a criminal action brought in the then-Magistrate's Court. It may still seek

criminal penalties in Criminal Court; however, as a matter of policy, the Department has currently chosen to pursue civil rather than criminal sanctions for Health Code infractions.

Article 7 of the Health Code, which was enacted in 1971, establishes an administrative tribunal to hear and determine allegations by the Department of code violations and to impose fines and penalties (Health Code, §7.01). After notification of the violation, the licensee may either admit to the violation and pay a fine or may serve an answer and demand a hearing before the tribunal. At the hearing, the burden of proof is on the Department and the licensee has the right to be represented by counsel, to present evidence and to cross-examine witnesses (Health Code, §7.09). An adverse determination can be appealed to a department review board (Health Code,

§7.13), and the determination of the review board is subject to judicial review in an Article 78 proceeding.

With respect to the fines imposed by the administrative tribunal, section 558(d) of the New York City Charter was amended by Chapter 221 of the Laws of 1980 to permit the tribunal to docket a final judgment in a court of competent jurisdiction. That subdivision also provides that the violation of any section of the Health Code may be prosecuted as a misdemeanor.

Supplementing this statutory and regulatory framework are several orders and directives of the Commissioner of the Department. Prior to 1976, the Department did not issue a notice of violation until a food-service establishment failed three inspections. Warnings were issued on the first two occasions. In 1976, the Department issued a directive, enforcement procedure

OEH-29, which changed that policy. Pursuant to that directive, a notice of violation was issued to any estabishment which failed an initial inspection and one reinspection. Thereafter, on July 6, 1983, the Commissioner of Health issued an order which once again changed the enforcement policy. Effective August 1, 1983, the Department would issue a notice of violation to a restaurant failing any inspection. In a cover letter accompanying a copy of his enforcement order sent to licensees, the Commissioner stated that this policy change was made necessary because "more than half of all inspected restaurants fail their first inspection before initiating corrective action".

In addition, the Department publishes the names of those establishments which have been adjudged by the administrative tribunal (either after hearing or upon admission of

violation) to have committed violations of the Health Code and the restaurant has failed both an initial inspection and one re-inspection. N.Y.C. Administrative Code, §§556-1.0, 556-9.0[1]

(2)

On or about August 5, 1983, the plaintiffs in this action, a trade association representing 1,200 New York City restaurants licensed by the Department of Health, and two named restaurants so licensed, served defendants State of New York,[2] City of New York, and Commissioner

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[1]The New York City Administrative Code was recodified effective September 1, 1986. Sections 556-1.0 and 556-9.0 of the Administrative Code have been recodified as sections 17-103 and 17-112, respectively.

[2]By order of the Appellate Division, First Departent, dated November 8, 1984, the complaint was dismissed against defendant State of New York for failure to state a cause of action.

of Health of the City of New York with a summons and complaint alleging, inter alia, that Article 7 of the Health Code, section 558(d) of the New York City Charter (amended by Chapter 221 of the Laws of 1980) and the July 6, 1983 Order of the New York City Commissioner of Health violate the State and Federal Constitutions. Plaintiffs sought a judgment declaring these statutes and regulations unconstitutional and void. With the complaint, plaintiffs also served an order to show cause for a preliminary injunction, enjoining implementation of the Commissioner of Health's July 6, 1983 Order.

By order of the Supreme Court, New York County (OSTRAU, J.), entered on February 6, 1984, plaintiffs' motion for a preliminary injunction was denied. The Court held, inter alia, that plaintiffs failed to demonstrate a likelihood of success on the merits. The Appellate Division, First

Department, in an order dated November 8, 1984, affirmed so much of the order appealed from as denied plaintiffs' motion for a preliminary injunction.

After issue was joined, plaintiffs moved, and defendants cross-moved, for summary judgment. Special Term, in an order entered October 29, 1985, denied plaintiffs' motion for summary judgment and granted defendants' cross-moton for summary judgment and dismissed the complaint. The Appellate Division, First Department, in an order entered April 1, 1986, unanimously affirmed for the reasons stated by Eugene Wolin, J., at Special Term. The New York Court of Appeals dismissed the appeal, sua sponte, upon the ground that no substantial constitutional question is directly involved.

OPINIONS BELOW

Supreme Court, New York County (Wolin, J.)

Special Term considered each of plaintiffs' constitutional attacks on the Department's regulatory and enforcement procedures and found them to be without merit. The Court found that the establishment of an administrative tribunal is within the broad grant of authority given to the Board of Health by section 558(b) of the New York City Charter. It noted that New York Courts have repeatedly held that section 558 is not an unconstitutional delegation of power by the Legislature but rather a permissible exception grounded in the belief that the protection of public health is a matter best left to the locality involved. The enabling statutes give the Board of Health broad discretion in selection of enforcement measures necessary to safeguard the public health including the promulgation

of regulations, the creation of a classification system for code violations and the establishment of an administrative tribunal.

The Court likewise found that the procedures established by the Board of Health to adjudicate whether Health Code violations have occurred comported with due process in all respects. The Court noted that a licensee who has failed an inspection is given a statement of the violations found and may demand a hearing before the tribunal. At that hearing, the burden is on the Department and the licensee has the right to be represented by counsel, to present evidence and to cross-examine witnesses. The determination of the tribunal is subject to administrative review and then to judicial review.

The Court also rejected plaintiffs' claims that the July 6, 1983 Order of the Commissioner of Health was unconstitutionally

vague. The Court held that the Order clearly delineates the enforcement policy of the Department and refers to the well-established classification system for code violators as well as the scoring system used by the Department. The Court further noted that the Schedule A violations and the scoring system are topics explained as part of the mandatory course given to licensees by the Department.

Finding all the other claims raised by plaintiffs to be similarly without merit, the Court dismissed the complaint.

Appellate Division
119 AD2d 427
500 NYS2d 224 (1986)

The Appellate Division unanimously affirmed the judgment (denominated order) appealed from for the reasons stated by Eugene Wolin, J., at Special Term.

New York Court of Appeals
68 NY2d 753 (1986)

The Court of Appeals sua sponte dismissed the appeal upon the ground that no substantial constitutional question is directly involved.

ARGUMENT

THE APPEAL SHOULD BE DISMISSED FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION. ARTICLE 7 OF THE NEW YORK CITY HEALTH CODE, WHICH ESTABLISHES AN ADMINISTRATIVE TRIBUNAL TO HEAR AND DETERMINE WHETHER ALLEGED VIOLATIONS OF THE HEALTH CODE HAVE OCCURRED, IS CONSTITUTIONAL IN ALL RESPECTS.

Whether the Board of Health Had the Power to Promulgate Article 7 of the Health Code Is Exclusively A State Law Question Which Was Raised Below And Decided Under State Law.

In the proceedings below, plaintiffs argued that the promulgation of the Health Code by the Board of Health constitutes an invalid exercise of authority vested in the State Legislature by Article 3, §1 of the

State Constitution and in the City Council by Chapter 2, §21 of the City Charter. Special Term, in ruling on this issue, held that the establishment of an administrative tribunal is within the broad grant of authority given to the Board of Health by section 558(b) of the New York City Charter.

Pursuant to section 558(b) of the New York City Charter, the Board of Health of the City of New York has been empowered with "broad discretion in the selection of measures by which the public health may be protected within the field of its jurisdiction," (Stracquadanio v. Department of Health, 285 NY 93, 97, 32 NE2d 806 [1941]), and broad authority to legislate on all matters relating to health (Grossman v. Baumgartner), 17 NY2d 345, 351, 271 NYS2d 195, 218 NE2d 259 [1966]), including power to "add to and alter, amend or repeal any part of the health code" and to "confer additional powers on

the department [of health] not inconsistent with the constitution, laws of this state or [the New York City] charter." N.Y.C. Charter, §558(b). This legislative power has been consistently upheld against charges that section 558(b) constitutes an improper delegation of the authority reserved to the State Senate and Assembly by Article III, section 1, of the State Constitution. Quaker Oats v. City of New York, 295 NY 527, 538-539 (1946), 68 NE2d 593, aff'd, 331 US 787 (1946); People v. Blanchard, 288 NY 145, 147, 42 NE2d 7 (1942); Colon v. Marshall, 185 Misc 638, 641, 59 NYS2d 52 (Sup. Ct., Kings Co., 1945), aff'd, 271 App Div 972, 68 NYS2d 438 (1947). Thus, the Board of Health lawfully created Article 7's tribunal pursuant to section 558(b) of the City Charter. Since this issue was resolved against plaintiffs on State law grounds, no appeal to this Court lies. See Herb v. Pitcairn, 324 US 117, 125-126 (1945);

McGoldrick v. Compagnie Generale Transtlantique, 309 US 430, 434-435 (1940); 12 MOORE'S FEDERAL PRAC. ¶511.01 (2d ed. 1982).

Plaintiffs' Due Process Claims Are Without Merit.

Under the statutory scheme involved here, a licensee who has failed an inspection is given a statement of the violations found and may demand a hearing before the tribunal. Article 7 of the Health Code contains detailed proceedings concerning service and content of the notice of hearing (Health Code, §7.05); provides for impartial hearing officers (Health Code, §7.11); guarantees the right to counsel, to present evidence, and to cross-examine witnesses (Health Code, §7.09); and establishes an internal review board (Health Code, §7.13), with judicial review in an Article 78 proceeding. The presence of these elements has been held sufficient to protect due

process rights. See, Smith v. Organization of Foster Families for Equity and Reform, 431 US 816, 848 (1977); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 US 1, 47 (1937).

Despite these extensive due process protections, plaintiffs nevertheless assert that the fact that the Board and Department of Health possess a combination of executive, legislative, and quasi-judicial functions must constitute a per se violaton of due process. This issue does not present a substantial constitutional question because it is well-settled that if power has been validly delegated to an administrative agency by the appropriate legislative body, as it has in the case of the Board and the Department of Health, nothing hinders the uniting of executive, legislative and judicial powers in a single hand. Prentis v. Atlantic Coast Line, 211 US 210, 225 (1908); see also,

Keller v. Potomac Electric Power Co., 261 US 428, 433 (1922); Saratoga Springs v. Saratoga Gas and Electric Co., 191 NY 123, 83 NE 693 (1908).

In Tumey v. Ohio, 273 US 510, 534 (1927) and Ward v. Village of Monroeville, 409 US 57, 60 (1972), cited by plaintiffs, this Court stated, with respect to a small town mayor who also served as judge in a municipal court, that "the mere union of the executive and judicial power in him cannot be said to violate due process of law." However, in Tumey and Ward, this Court found violations of due process because the mayor either received direct financial advantage from the fines he levied as judge, or the Court found that his executive responsibility for village finances was likely to render him partisan, or both.

Under the statutory scheme involved herein, the Department of Health's hearing

examiners are prohibited by law from performing any non-adjudicative services for the Department (Health Code, §7.03), and receive no financial gain from finding an alleged violator guilty. Their connection with the executive and legislative activities of the Department and Board is too remote to violate due process. See, Dugan v. Ohio, 277 US 61 (1918).

The July 6, 1983 Order of the Commissioner of Health Is Not Unconstitutionally Vague.

In seeking to sustain an appeal as of right to the New York Court of Appeals on constitutional grounds, pursuant to McKinney's Civil Practice Law and Rules, section 5601(b)(1), plaintiffs filed two statements with the Court -- a Jurisdictional Statement pursuant to Rule 500.2 of the Rules of the Court of Appeals and a letter in support of retention of jurisdiction in response to the Court's sua sponte

examination of jurisdiction. In both statements, plaintiffs failed to raise the issue of vagueness. That issue is therefore not properly before this Court. See Illinois v. Gates, 462 US 213, 217-224 (1982), reh. den., 463 US 1237 (1983); McGoldrick v. Compagnie Generale Transatlantique, supra, 309 US at 434-434; 12 MOORE'S FEDERAL PRAC. ¶510.01.

In any event, plaintiffs' wholly conclusory claim that the July 16, 1983 Order is unconstitutionally vague is without merit.

The Commissioner's Order of July 6, 1983 merely announced the Department of Health's decision to issue violations when a restaurant failed to pass inspection on the first visit, rather than to give a warning on the first inspection and to issue a formal violation only if the code infringement observed by inspectors had not been

eliminated by the time of a second, follow-up inspection. The Order also informed restaurant owners that, if they chose to do so, they could eliminate the required personal appearance before the Department's administrative tribunal by pleading guilty to an alleged violation by mail and paying a pre-assessed fine as set forth in a schedule of fines included in the Order.

Language is unconstitutionally vague only if it "fails to give adequate warning of what activities it proscribes or fails to set out 'explicit standards' for those who must apply it." Broadrick v. Oklahoma, 413 US 606, 607 (1973); see also, Roth v. United States, 354 US 476, 491 (1957); United States v. Petrillo, 332 US 1, 7-8 (1947). The July Order clearly delineates the enforcement policy of the Department and refers to the well-established classification system for code violations as well as to the scoring system

used by the Department to determine the existence and severity of violations. Both are topics explained as part of the mandatory course given to licensees by the Department. The Order instituted no substantive change from past practices. The July 6, 1983 Order is not unconstitutionally vague.

Plaintiffs' Fourth Amendment Claim Which Was Raised For the First Time In The Appellate Division Was Not Passed On By The New York Courts And Thus An Appeal to this Court Does Not Lie.

It is well-settled that this Court will not undertake to review what the court below did not decide. Walters v. City of St. Louis, 347 US 231, 233 (1954).

Plaintiffs argued for the first time on appeal in the Appellate Division that the Department's inspections of restaurant premises are tantamount to "unreasonable searches" in violation of the Fourth Amendment. Defendants had no opportunity

to offer evidence on this issue in the trial court. Since this claim was not included in plaintiff's complaint, and there is no allegation that any restaurant proprietor withheld consent to Department inspections, this issue was not properly raised on appeal and, in fact, was not ripe for review. Since the Appellate Division affirmed the grant of summary judgment in defendants' favor for the reasons stated by Special Term, and the issue was not before Special Term, it appears that the Appellate Division did not pass on the issue. The New York Court of Appeals dismissed the appeal for want of a substantial Constitution question. In New York, the Court of Appeals cannot review a constitutional issue where it was not raised below. Anonymous v. Codd, 40 NY2d 860, 387 NYS2d 1004, 356 NE2d 475 (1976). Since the issue was not passed on below, it cannot sustain an appeal as of right to this Court.

In any event, the claim that the Department's inspections of restaurant premises are tantamount to "unreasonable searches" in violation of the Fourth Amendment is without merit. While the Fourth Amendment's prohibition against unreasonable searches and seizures applies to administrative inspections of private commercial property (Marshall v. Barlow's, Inc., 436 US 307 [1978]; See v. City of Seattle, 387 US 541 [1967]; Sokolov v. Village of Freeport, 52 NY2d 341, 438 NYS2d 257, 420 NE2d 55 [1981]), a long-standing exception to the search warrant requirement has been recognized for "pervasively regulated business[es]," (United States v. Biswell, 406 US 311, 316 [1972]), and for "closely regulated" industries "long subject to close supervision and inspection" (Colonnade Catering Corp. v. United States, 397 US 72, 74, 77 [1970]). These decisions

"make clear that a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal [or state] regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." Donovan v. Dewey, 452 US 594, 600 (1981).

Such is the case here. The food industry is a closely regulated business and, as such, has been held to fall within the "Biswell-Colonnade" exception permitting warrantless administrative inspections in furtherance of the regulatory scheme. United States v. Gel Spice Co., Inc., 601 F Supp 1214, 1229 (E.D.N.Y., 1985); United States v. New England Grocers Supply Co., 488 F

Supp 230, 238 (D. Mass., 1980); City of Chicago v. Pudlo, 123 Ill. App 3d 337, 462 NE2d 494 (1983), cert. den., 105 S Ct 2140 (1985); see, United States v. Jamieson-McKames Pharmaceuticals, Inc., 651 F2d 532, 536-538 (8th Cir., 1981), cert. den., 455 US 1016 (1982); cf., United States v. Gordon, 655 F2d 478, 482-484 (2d Cir., 1981) (warrantless search pursuant to New York State Insurance Law did not violate the Fourth Amendment). Each restaurant proprietor, as a participant in a pervasively regulated business, "has voluntarily chosen to subject himself to a full arsenal of governmental regulation" (Marshall v. Barlow's Inc., supra, 436 US 307, 315). The inspections provided for pursuant to section 566 of the City Charter, and sections 3.01 and 3.05 of the Health Code, insure compliance with, and deter evasion of, the New York City Health Code. These

inspections are an essential part of the regulatory scheme and are fully consistent with the Fourth Amendment. See United States v. Biswell, supra, 406 US 311.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION. ALTERNATIVELY, THE ORDER APPEALED FROM SHOULD BE AFFIRMED. IF THE JURISDICTIONAL STATEMENT IS TREATED AS A PETITION FOR WRIT OF CERTIORARI, THE PETITION SHOULD BE DENIED.

Respectfully submitted,

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APPENDIX

New York City Charter

CHAPTER 22

DEPARTMENT OF HEALTH

§551. Department; commissioner. a. There shall be a department of health, the head of which shall be the commissioner of health who shall be appointed by the mayor....

* * *

§553. Board of health. a. There shall be in the department a board of health, the chairman of which shall be the commissioner....

* * *

§556. Functions, powers and duties of the department. Except as otherwise provided by law, the department shall have jurisdiction to regulate all matters affecting health in the city of New York and to perform all those functions and operations performed by the city that relate to the health of the people of the city....

* * *

§558. Health Code.***

(b) The board of health from time to time may add to and alter, amend or repeal any part of the

health code, and may therein publish additional provisions for security of life and health in the city and confer additional powers on the department not inconsistent with the constitution, laws of this state or this charter, and may provide for the enforcement of the health code or any orders made by the commissioner or the board of health, by such fines, penalties, forfeitures and imprisonment as may be prescribed therein or otherwise by law.

* * *

New York City Health Code

ARTICLE 3 GENERAL PROVISIONS

§3.01 General powers of the Department

(a) The Department may inspect any premises, matter or thing within its jurisdiction, including but not limited to any premises where an activity regulated by this Code is carried on, and any record required to be kept pursuant to this Code.

(b) In order to determine whether the provisions of this Code or the provisions of other law which the Department has the duty to enforce pursuant to section 556(c) of the Charter are being complied with, the Department may investigate or authorize an investigation to be made of any

matter, incident, thing, person or event within its jurisdiction.

* * *

§3.12 Fines, penalties and forfeitures for certain violations of the Code.

Any person who is determined to have violated this Code, or who holds, or is required to hold, a permit from the Board or the Commissioner or who is registered, or required to be registered, with the Department shall be subject to a fine, penalty and forfeiture of not more than five hundred dollars for each violation of a provision of this Code relating to such businesses, trades, occupations or other activities. Each such violation shall be a separate and distinct offense, and in the case of a continuing violation, each day's continuance thereof shall be a separate and distinct offense.

§3.13 Enforcement of Code otherwise than by prosecution or other compulsory means

In lieu of enforcement of this Code by way of prosecution, recovery of civil penalties, revocation of permits, seizure, embargo and condemnation, and other compulsory means, the Department may seek to obtain the voluntary compliance with this Code by way of notice, warning or other educational means; this section

does not, however, require that such non-compulsory methods be used before proceeding by way of compulsory enforcement.

ARTICLE 7
ADMINISTRATIVE TRIBUNAL

§7.01 Administrative tribunal; establishment, powers and duties

There is hereby established in the Department an Administrative Tribunal which shall have the power and duty:

(1) To accept pleas to, and hear and determine allegations by the Department of violations of this Code, the Administrative Code of The City of New York, the Sanitary Code of the State of New York and other laws and regulations which the Department has the duty to enforce;

(2) to examine witnesses and receive evidence;

(3) to impose fines, penalties and forfeitures in accordance with Section 3.12 of this Code;

(4) to compile and maintain complete and accurate records relating to its proceedings, including copies of all findings of violation served, answers, notices of appeal and briefs filed, and decisions rendered by the hearing examiners and the Review Board;

(5) to adopt such rules and regulations as may be necessary or appropriate to effectuate the purposes of this article, including rules and regulations prescribing the organization of the Tribunal, the hearing procedures, the number of copies and the forms of various documents to be filed, and the manner of payment of penalties;

§7.03 Officials of the Tribunal

(a) The head of the Tribunal shall be the Director, who shall be appointed by the Board for a term of three years. The Director may be removed for cause but not without an opportunity to be heard. The Director shall devote full time to the Tribunal and shall perform no other services for the Department. The Director shall have the power to exercise or delegate any of the powers and duties vested in him or in the Tribunal; provided, however, he shall not delegate those powers and duties enumerated in Section 7.11.

(b) The Director shall appoint, in accordance with law, such number of hearing examiners as may be required to discharge the responsibilities of the Tribunal. The hearing examiners, who shall be attorneys admitted to practice in the State of New York, may serve on either a part-time or

full-time basis but shall perform no other services for the Department.

* * *

§7.09 Hearings

(a) Hearings shall be open to the public, presided over by a hearing examiner and shall proceed with all reasonable expedition and order and, insofar as practicable shall be held at one place and shall not be postponed or adjourned;

(b) Each party to a proceeding shall have the right to be represented by counsel, to present evidence, to examine and cross-examine witnesses (subject to the limitation contained in Section 7.07(b)), and shall have all other rights essential to a fair and impartial hearing.

(c) The Department shall have the burden of proving the factual allegations contained in the finding of violation by a fair preponderance of the evidence; however, each finding of violation shall be maintained by the Department as a record kept in the regular course of business and shall be prima facie proof of the facts contained therein.* * *

§7.11 Disqualification of Hearing Examiners

(a) A hearing examiner shall not preside over a hearing in which he

is a party, in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the proceeding within the sixth degree. The degree shall be ascertained by ascending from the hearing examiner to the common ancestor, descending to the party, counting a degree for each person in both lines, including the hearing examiner and the party, and excluding the common ancestor.* * *

§7.13 Review Board* * *

(b) The Review Board shall have the jurisdiction to review all final decisions of the hearing examiners with regard to whether the facts found therein are supported by substantial evidence in the record, the law and the penalty, but shall not consider any evidence which was not presented to the hearing examiner. The Review Board, whose decisions shall require the agreement of a majority of its members, shall have the power to reverse, remand or modify any decision appealed from and may reduce the amount of any penalty imposed.